

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of BRUCE R. HOWARD and AGENCY FOR INTERNATIONAL
DEVELOPMENT, Rosslyn, VA

*Docket No. 97-2261; Submitted on the Record;
Issued August 4, 1999*

DECISION and ORDER

Before MICHAEL J. WALSH, DAVID S. GERSON,
MICHAEL E. GROOM

The issue is whether appellant sustained an emotional condition in the performance of duty causally related to factors of his federal employment.

On November 15, 1994 appellant, then a 59-year-old auditor, filed an occupational disease claim alleging that he sustained an emotional condition in the performance of duty. He attributed his claimed emotional condition to being investigated by the employing establishment. He alleged that the Office of Workers' Compensation Programs improperly issued a letter of admonishment alleging that he entered into an unlawful contract for travel service for his agency and that the employing establishment improperly failed to remove all copies of the letter after a ruling that the letter was improperly issued. Appellant also stated that in August 1992 the employing establishment initiated an investigation of him and, at the completion of the investigation, proposed a 60-day suspension without pay for allegations which he stated were false.¹ He stated that he pursued a grievance regarding the proposed suspension for 15 months and then sought medical treatment for depression. Appellant stated that on October 5, 1994 the Foreign Service Grievance Board found no evidence of wrongdoing on his part and ordered the proposed suspension rescinded. Appellant also alleged that the employing establishment harassed him, after he filed a grievance concerning the investigation, by requesting medical information from his physician and attendance information from his supervisor to determine whether any action should be taken regarding his security clearance.

¹ The record shows that appellant was accused of a number of infractions of regulations and policies regarding the use of government-owned vehicles and a 60-day suspension was proposed. After appellant appealed the suspension, the employing establishment dropped all of the allegations except for the charge of unauthorized garaging of government vehicles and reduced the proposed suspension to 30 days.

In a report dated August 18, 1994, Phillip L. Rosenblum, MSW, LCSW, related appellant's complaint that his depression was caused by the investigation of alleged improprieties at work.²

Of record is a copy of an October 5, 1994 decision of the Foreign Service Grievance Board in which that Board found that the employing establishment did not have grounds to take disciplinary action against appellant. The Board directed that the 30-day suspension be rescinded, that the employing establishment expunge all records of references to the proposed suspension, and adjust his performance pay/salary level retroactive to the date it would have otherwise been effective.

In a report dated November 4, 1994, Dr. Barry C. Gorman, a Board-certified psychiatrist, related that appellant sought treatment on March 29, 1994 and was found to be clinically depressed.

In a statement dated November 17, 1994, James B. Durnil, an Assistant Inspector General at the employing establishment and appellant's supervisor, related that appellant was the subject of an investigation which commenced in August 1992 and resulted in a proposed suspension without pay for 60 days which was issued on January 8, 1993. He noted that on October 5, 1994 the Foreign Service Grievance Board ordered the employing establishment to rescind the suspension as the Board found the employing establishment charges to be unsubstantiated. Mr. Durnil stated that on March 16, 1994 appellant arrived at his home in a state of distress and he later learned that appellant had sought medical attention. He stated that appellant's statements regarding his claim were factual and complete.

By decision dated December 21, 1995, the Office denied appellant's claim for compensation benefits on the grounds that the evidence of record failed to establish that he had sustained an emotional condition in the performance of duty. The Office accepted as a compensable factor of employment the investigation conducted by the employing establishment but stated that the medical evidence of record did not establish that appellant's claimed emotional condition was causally related to the investigation.

By letter dated January 15, 1996, appellant requested reconsideration of the denial of his claim but submitted no additional evidence.

By decision dated February 1, 1996, the Office denied appellant's request for further merit review of his claim.

By letter dated February 16, 1996, appellant requested reconsideration of the denial of his claim and submitted additional evidence.

In a report dated February 12, 1996, Dr. Gorman related that appellant was referred to him for psychiatric consultation in March 1994. He stated that he found appellant to be agitated and depressed and that his emotional state was precipitated and exacerbated by an ongoing

² The Board notes that a licensed clinical social worker is not a "physician" under the Act and thus cannot render a medical opinion on causal relationship; *see* 5 U.S.C. § 8101(2).

investigation which was taking place at work. Dr. Gorman stated, “it is my opinion that the investigation at work was the main precipitating factor for [appellant’s] illness, leave of absence and [counseling].”

By decision dated June 28, 1996, the Office modified the Office’s December 21, 1995 decision. The Office stated that the investigation conducted by the employing establishment was not a compensable factor of employment as the evidence of record did not support that the employing establishment committed error or abuse in conducting its investigation of appellant. The Office stated that there was one compensable factor of employment established by the record, that the employing establishment erred in its issuance of a letter of admonishment to appellant and also erred in failing to remove all copies of the letter from its records after one year but that the medical evidence of record did not establish that appellant’s claimed emotional condition was due to this compensable factor of employment but was rather due to the noncompensable factor of the investigation.

The Board finds that this case is not in posture for a decision.

Workers’ compensation law does not apply to each and every injury or illness that is somehow related to an employee’s employment. There are situations where an injury or an illness has some connection with the employment but nevertheless does not come within the concept or coverage of workers’ compensation. Where the disability results from an employee’s emotional reaction to his regular or specially assigned duties or to a requirement imposed by the employment, the disability comes within the coverage of the Federal Employees’ Compensation Act.³ On the other hand, the disability is not covered where it results from such factors as an employee’s fear of a reduction-in-force or his frustration from not being permitted to work in a particular environment or to hold a particular position.⁴

Appellant has the burden of establishing by the weight of the reliable, probative and substantial evidence that the condition for which he claims compensation was caused or adversely affected by employment factors.⁵ This burden includes the submission of a detailed description of the employment factors or conditions which appellant believes caused or adversely affected the condition or conditions for which compensation is claimed.⁶

In cases involving emotional conditions, the Board has held that, when working conditions are alleged as factors in causing a condition or disability, the Office, as part of its adjudicatory function, must make findings of fact regarding which working conditions are deemed compensable factors of employment and are to be considered by a physician when providing an opinion on causal relationship and which working conditions are not deemed

³ 5 U.S.C. §§ 8101-8193.

⁴ See *Thomas D. McEuen*, 41 ECAB 387, 391 (1990), *reaff’d on recon.*, 42 ECAB 566 (1991); *Lillian Cutler*, 28 ECAB 125 (1976).

⁵ *Pamela R. Rice*, 38 ECAB 838, 841 (1987).

⁶ *Effie O. Morris*, 44 ECAB 470, 473 (1993).

factors of employment and may not be considered.⁷ If a claimant does implicate a factor of employment, the Office should then determine whether the evidence of record substantiates that factor. When the matter asserted is a compensable factor of employment and the evidence of record establishes the truth of the matter asserted, the Office must base its decision on an analysis of the medical evidence.⁸

In the present case, appellant alleged that he sustained an emotional condition as a result of a number of employment incidents and conditions. The Board must, thus, initially review whether these alleged incidents and conditions of employment are covered employment factors under the terms of the Act.

Appellant has alleged that harassment from the employing establishment contributed to his claimed stress-related condition. He alleged that the employing establishment harassed him, after he filed a grievance concerning an investigation, by requesting medical information from his physician and attendance information from his supervisor to determine whether any action should be taken regarding his security clearance. To the extent that disputes and incidents alleged as constituting harassment and discrimination by supervisors are established as occurring and arising from appellant's performance of his regular duties, these could constitute employment factors.⁹ However, for harassment or discrimination to give rise to a compensable disability under the Act, there must be evidence that harassment or discrimination did in fact occur. Mere perceptions of harassment or discrimination are not compensable under the Act.¹⁰ In the present case, the employing establishment denied that appellant was subjected to harassment or discrimination and appellant has not submitted sufficient evidence to establish that he was harassed or discriminated against by the employing establishment regarding the investigation.¹¹ Thus, appellant has not established a compensable employment factor under the Act in this respect.

Regarding appellant's allegation that the employing establishment erred or acted abusively in handling its investigation of him, the Board has held that investigations, which are an administrative function of the employing establishment, that do not involve an employee's regularly or specially assigned employment duties are not considered to be employment factors.¹² However, the Board has also found that an administrative or personnel matter will be considered to be an employment factor where the evidence discloses error or abuse on the part of the employing establishment. In determining whether the employing establishment erred or acted abusively, the Board has examined whether the employing establishment acted

⁷ See *Margaret S. Krzycki*, 43 ECAB 496, 502 (1992); *Norma L. Blank*, 43 ECAB 384, 389-90 (1992).

⁸ *Id.*

⁹ *David W. Shirey*, 42 ECAB 783, 795-96 (1991); *Kathleen D. Walker*, 42 ECAB 603, 608 (1991).

¹⁰ *Jack Hopkins, Jr.*, 42 ECAB 818, 827 (1991).

¹¹ See *Joel Parker, Sr.*, 43 ECAB 220, 225 (1991) (finding that a claimant must substantiate allegations of harassment or discrimination with probative and reliable evidence).

¹² *Jimmy B. Copeland*, 43 ECAB 339, 345 (1991).

reasonably.¹³ Case precedent has never required evidence of intentional wrongdoing to establish error on the part of an employing establishment. The Board has found that error resulting from a misunderstanding by the employing establishment was equally sufficient to constitute a compensable factor of employment.¹⁴ In this case, the Board finds that the evidence of record establishes that the employing establishment erred in its investigation of appellant. Of record is a copy of an October 5, 1994 decision of the Foreign Service Grievance Board in which the Board found that the employing establishment did not have grounds to take disciplinary action against appellant regarding the garaging of government vehicles. The Board directed that the 30-day suspension be rescinded, that the employing establishment expunge all records of references to the proposed suspension and adjust his performance pay/salary level retroactive to the date it would have otherwise been effective. In a statement dated November 17, 1994, Mr. Durnil, an Assistant Inspector General at the employing establishment and appellant's supervisor, related that appellant was the subject of an investigation which commenced in August 1992 and resulted in a proposed suspension without pay for 60 days. He noted that on October 5, 1994 the Foreign Service Grievance Board ordered the employing establishment to rescind the suspension as the Board found the employing establishment charges to be unsubstantiated. He stated that appellant's statements regarding his claim were factual and complete. The Board finds that there is sufficient evidence of record to establish that the employing establishment erred in its investigation of appellant.

However, appellant's burden of proof is not discharged by the fact that he has established an employment factor which may give rise to a compensable disability under the Act. To establish his occupational disease claim for an emotional condition, appellant must also submit rationalized medical evidence establishing that he has an emotional or psychiatric disorder and that such disorder is causally related to the accepted compensable employment factor.¹⁵ In a report dated February 12, 1996, Dr. Gorman, a Board-certified psychiatrist, related that appellant was referred to him for psychiatric consultation in March 1994. He stated that he found appellant to be agitated and depressed and that his emotional state was precipitated and exacerbated by an ongoing investigation which was taking place at work. Dr. Gorman stated, "it is my opinion that the investigation at work was the main precipitating factor for [appellant's] illness, leave of absence and [counseling]." Although Dr. Gorman failed to provide sufficient medical rationale in support of his opinion, his report constitutes substantial uncontroverted evidence in support of appellant's claim and is sufficient to require that the case be remanded for further development of the claim.¹⁶

Regarding the letter of admonishment issued to appellant by the employing establishment and the failure to remove all copies of the letter from his record within one year, the Board finds that the Office correctly determined that this was a compensable factor of employment but that

¹³ See *Richard J. Dube*, 42 ECAB 916, 920 (1991).

¹⁴ See *Abe E. Scott*, 45 ECAB 164, 172-73 (1993).

¹⁵ See *William P. George*, 43 ECAB 1159, 1168 (1992).

¹⁶ See *John J. Carlone*, 41 ECAB 354 (1989); *Horace Langhorne*, 29 ECAB 820 (1978). The Board further notes that in the present case the record contains no medical opinion contrary to appellant's claim.

the medical evidence of record did not establish that appellant's claimed emotional condition resulted from this compensable factor. As noted above, Dr. Gorman found that appellant's emotional condition was caused by the investigation into appellant's use of government vehicles. As he did not opine that the condition was causally related to the letter of admonishment concerning a contract for travel services, this report does not establish that the emotional condition was related to this factor of employment.

The June 28, 1996 decision of the Office of Workers' Compensation Programs is set aside and the case is remanded for further action consistent with this decision of the Board.

Dated, Washington, D.C.

August 4, 1999

Michael J. Walsh
Chairman

David S. Gerson
Member

Michael E. Groom
Alternate Member